STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 2, 2006
v	No. 258438 Macomb Circuit Court
KENYON CLINTON, Defendant-Appellant.	LC No. 2002-002884-FC

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ.

PER CURIAM.

Defendant was charged with kidnapping, MCL 750.349, assault with intent to rob while armed, MCL 750.89, conspiracy to commit kidnapping, MCL 750.349 and MCL 750.157a, conspiracy to commit armed robbery, MCL 750.529 and MCL 750.157a, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. A jury acquitted him on the kidnapping count, but found him guilty as charged on the remaining counts. He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent sentences of 23 years and 9 months to 40 years' imprisonment for the assault with intent to rob while armed, conspiracy to commit kidnapping, and conspiracy to commit armed robbery convictions, to be served consecutive to two years' imprisonment for the felony-firearm convictions. We reverse.

Defendant's convictions arise out an incident that occurred in the parking lot of a Target store on May 14, 2002. Carol Colpitts was at the Target store with her two-year-old son. After leaving the store, she placed her son in his car seat and saw a man later identified as defendant walking toward her with a gun. Defendant told her not to move and demanded her car keys. As she was trying to prevent him from taking her car keys, he started pulling her toward a white car with the back passenger door open that was parked behind her minivan. She started screaming, fell to the ground, and observed defendant's shoes as he got into the white car, which then sped away. Other persons in the parking lot heard Colpitts scream and witnessed the assault, including a Target security employee who observed the incident while conducting surveillance. The surveillance tape was played during trial.

Police thereafter found the unoccupied white car with the engine running and both passenger doors open. Defendant and two codefendants were later apprehended on foot. Defendant eventually provided an oral and a written statement to police admitting his culpability, and defendant's fingerprints were recovered from the front passenger window of the car and

from a lemonade bottle found inside the car. Both Colpitts and the Target security employee identified defendant as the perpetrator during a photographic lineup.

Defendant, who represented himself at trial, argues that he is entitled to a new trial because the trial court failed to apprise him of the dangers of self-representation and failed to determine whether he knowingly, intelligently, and voluntarily waived his right to counsel. We reluctantly agree.[1]

When assessing the validity of a defendant's waiver of the right to counsel, this Court engages in a de novo review of the entire record, but will not disturb a trial court's factual findings regarding a knowing and intelligent waiver unless clearly erroneous. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). The meaning of "knowing and intelligent" is a question of law that is reviewed de novo. *Id*.

> Before granting a defendant's request to represent himself or herself, the trial court must determine that the three factors set forth in *People v Anderson* have been met: (1) the defendant's request is unequivocal, (2) the defendant is asserting the right knowingly, intelligently, and voluntarily after being informed of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. [*People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005), citing *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976).]

In addition, a trial court must satisfy the requirements of MCR 6.005(D), which provides that a trial court may not allow a defendant to waive the right to representation without first

> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

See also *Willing*, *supra* at 219-220. In determining whether the above requirements were met, this Court should "indulge every reasonable presumption against the waiver of fundamental constitutional rights." *Williams*, *supra* at 641 (internal quotation marks and citations omitted). Further, "[p]resuming waiver from a silent record is impermissible. The record must show, or

[1] After a review of the lower court record, it appears obvious that defendant's request on the first day of trial to either retain counsel or to have a third attorney appointed for him was one of several tactics to delay his trial. The trial court, noting that no appearance by a retained attorney had been filed, and that defendant had already had two appointed attorneys, denied defendant's request to adjourn trial or to appoint new counsel. At that point, defendant requested to represent himself. Appointed counsel remained as advisory counsel.

there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Willing, supra* at 220 (internal quotation marks and citations omitted).

In *People v Russell*, 471 Mich 182, 191; 684 NW2d 745 (2004), our Supreme Court reaffirmed that the scope of judicial inquiry required under *Anderson* and MCR 6.005(D) is one of "substantial compliance":

> We hold, therefore, that trial courts must substantially comply with the aforementioned substantive requirements set forth in both *Anderson* and MCR 6.005(D). Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures. The nonformalistic nature of a substantial compliance rule affords the protection of a strict compliance rule with far less of the problems associated with requiring courts to engage in a word-for-word litany approach. . . .
>
> Completion of these judicial procedures allows the court to consider a request to proceed in propria persona. If a judge is uncertain regarding whether any of the waiver procedures are met, he should deny the defendant's request to proceed in propria persona, noting the reasons for the denial on the record. The defendant should then continue to be represented by retained or appointed counsel, unless the judge determines substitute counsel is appropriate. [*Id*., quoting *People v Adkins (After Remand)*, 452 Mich 702, 726-727; 551 NW2d 108 (1996) (emphasis deleted).]

The *Russell* Court stated that if a trial court fails to substantially comply with the requirements of *Anderson* and MCR 6.005(D), "then the defendant has not effectively waived his Sixth Amendment right to the assistance of counsel." *Id*. at 191-192. The Court further stated that the substantial compliance rule "provides a practical, salutary tool to be used to avoid rewarding gamesmanship as well as to avoid the creation of appellate parachutes: if any irregularities exist in the waiver proceeding, the defendant should continue to be represented by counsel." *Id*. at 192.

Here, the record shows that defendant did not unequivocally waive his right to counsel. After the trial court denied defendant's request for an adjournment, the following colloquy ensued:

> *MR. HADDAD [Defense Counsel]:* Mark Haddad, assigned counsel on behalf of the defendant. In light of the Court's prior rulings a few moments ago, Mr. Clinton advises me that he wishes to conduct his own defense.
>
> *THE COURT:* Is that correct, Mr. Clinton?
>
> *DEFENDANT CLINTON:* With the help of my attorney, I'll be co-counsel with him.

THE COURT: Well, you're either going –

MR. HADDAD: Can't do that.

THE COURT: -- to allow him to do that, or you're going to just have him sit by as advisory counsel.

DEFENDANT CLINTON: Well, I mean, you already told me, I got go [sic] to Court with a lawyer I don't even want to go with, so I might as well represent myself.

THE COURT: You're going to represent yourself then?

DEFENDANT CLINTON: Why not.

THE COURT: Okay. You have the Michigan Rules of Evidence and Michigan Court Rules beside the gentleman.

DEFENDANT CLINTON: We're not going by the law anyway, so it doesn't matter. No, I don't need it.

THE COURT: Okay. Mr. Haddad will be there for your disposal when you need him. Let's bring them in [i.e., the jury].

THE BAILIFF: Yes, sir.

DEFENDANT CLINTON: Can I ask you a question? Mr. Miller [sic, Judge Miller] –

THE COURT: Charlie, we're going to need all the room we can get. No, you can't ask me a question, Mr. Clinton. You cannot.

DEFENDANT CLINTON: All right.

THE BAILIFF: All rise for the jury, please.

Following this discussion, jury selection commenced. The trial court allowed defendant to voir dire potential jurors, after which the trial court stated:

THE COURT: . . . I also want to just reaffirm, Mr. Clinton, that you, at this point, still want to represent yourself, I want to say this much. I think you did a very good job voir diring the jury. You certainly are well-versed and well-spoken. One of the reasons why we can deny defendant [sic] the opportunity to defend themselves is if they are disruptive, and you've been anything but disruptive. You've been very constructive, I must say.

* * *

> Meantime, I want to assure you that if at some point you wish to have Mr. Haddad act as your attorney you may do so.
>
> Meantime, I'm going to afford you every opportunity and every courtesy I possibly can so that you can represent yourself appropriately, you think is in an effective manner [sic]. Okay. Fair enough?

The foregoing discussions show that defendant did not unequivocally waive his right to counsel and knowingly, intelligently, and voluntarily assert his right to represent himself. Further, the trial court did not even minimally comply with *Anderson* or MCR 6.005(D). During the first and second days of trial, the trial court made no attempt to determine whether defendant's request to represent himself was unequivocal and did not inform defendant of the dangers of self-representation. In addition, the trial court made no determination that defendant asserted his right to self-representation knowingly, intelligently, and voluntarily. *Willing, supra* at 219, citing *Anderson, supra* at 367-368. In fact, the trial court made no factual findings whatsoever for this Court to review when assessing the validity of defendant's purported waiver. *Williams, supra* at 640. On the second day of trial, defendant represented himself and cross-examined witnesses without any discussion regarding the fact that he was representing himself.

The only arguably unequivocal assertion of defendant's right to self-representation occurred at the beginning of the third day of trial. At that time, the trial court inquired of defendant whether he wished to continue representing himself or whether he desired to be represented by appointed counsel. Defendant stated that he wanted to continue representing himself. The trial court complimented defendant's performance at the end of trial that day and again offered defendant the opportunity to be represented by appointed counsel. Even if defendant's assertion of his right to represent himself on the third day of trial is considered unequivocal, the trial court nevertheless failed to even minimally comply with the factors set forth in *Anderson* or MCR 6.005(D). As the Supreme Court stated in *Russell, supra*, "if the trial court fails to substantially comply with the requirements in *Anderson* and the court rule, then the defendant has not effectively waived his Sixth Amendment right to the assistance of counsel." *Russell, supra* at 191-192. Moreover, this Court rejects the notion that a mid-trial waiver of counsel, even if valid, constitutes a valid waiver of counsel with respect to previous proceedings. It is well-established that the right to counsel is fundamental and attaches at all critical stages of proceedings, including at trial. *Id*. at 187-188. Thus, a waiver of counsel on the third day of trial, even if valid at that point, does not vitiate a previous Sixth Amendment violation occurring on the first and second days of trial. Because defendant experienced a "total deprivation of counsel," despite the assistance of standby counsel, *Willing, supra* at 228-229, reversal is required.

In light of our resolution of this issue, we need not address defendant's remaining issues on appeal.

Reversed and remanded. Jurisdiction is not retained.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald